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687052—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 871

UPCHURCH PACKING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 10–15) is reported at 53 F. Supp. 791. The opinion of the Circuit Court of Appeals (R. 21–28) is reported at 151 F. 2d 983.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 20, 1945. (R. 28–29.) The petition for a writ of certiorari was filed on February 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether, under Section 902 of the Revenue Act of 1936, the petitioner, whose sole stockholder was also the sole stockholder of a corporation which had paid processing taxes under the Agricultural Adjustment Act, may secure a refund of any of those taxes, despite the fact that the taxpayer, whose assets were subsequently acquired by the petitioner, could not establish that it had borne the burden of the taxes, that burden having been shifted to the petitioner.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant,

or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644.)

* * * * *

STATEMENT

This suit was brought by the petitioner for the recovery of custom processing taxes paid by the Atlanta Butchers Abattoir & Stockyards Company under the Agricultural Adjustment Act of 1933, 48 Stat. 31. The cause of action is pleaded

in two counts[1] (R. 2–8), the first upon the claim that the petitioner bore the burden of the tax it seeks to recover and the second upon the claim that it is inherently impossible to establish by proof to what extent it bore the burden of the tax.

The first count alleged the following facts: During the period November, 1933, to May, 1935, the Atlanta Butchers Abattoir & Stockyards Company, a corporation, to which, for convenience, we shall refer as the Abattoir, slaughtered hogs for customers, of whom the petitioner was one, and, as the first domestic processor under the Agricultural Adjustment Act, paid processing taxes imposed under that Act in the amount of $45,183.85 (R. 4).

The Abattoir collected from its customers the amount of the processing taxes it paid by adding that amount to its usual charge for slaughtering. Of the processing taxes paid by the Abattoir, $33,968.11 was paid upon slaughtering done for the petitioner. (R. 5.)

During the period in which the taxes were paid by the Abattoir, W. F. Upchurch was the president and sole stockholder of the appellant and of the Abattoir. On December 28, 1935, in accordance with a plan for reorganization duly adopted by the stockholders of the petitioner and of the Abattoir, the petitioner acquired all of the assets of the Abattoir in consideration of the issuance

[1] The complaint contained a third count which was dismissed upon stipulation (R. 16).

of 100 shares of its stock to the stockholders of the Abattoir. The Abattoir was dissolved on December 29, 1936, by order of the Superior Court of Fulton County, Georgia. (R. 3–4.)

The petitioner bore the burden of a substantial portion of the tax paid by the Abattoir upon the slaughtering of its hogs and in no manner shifted the burden of the amount by which the charge for slaughtering was increased to cover the tax (R. 7).

The second count repeats the allegations of the first and alleges, in addition, that it is impossible to ascertain the extent to which the petitioner shifted the burden of the tax (R. 8).

The Government moved for judgment on the pleadings (R. 9) upon the ground that none of the counts in the complaint states a claim upon which relief can be granted. This motion was granted with respect to the first and second counts (R. 10–15) and judgment was entered (R. 15–16) dismissing the complaint.

The Circuit Court of Appeals affirmed this judgment of the District Court (R. 29).

ARGUMENT

1. The courts below correctly held that the petitioner stood in the shoes of its assignor and had no better claim than did its assignor. *Fidelity Mutual Life Ins. Co.* v. *Clark,* 203 U. S. 64, 74. Under Section 902 of the Revenue Act of 1936, *supra,* the right to refunds of taxes collected

under the Agricultural Adjustment Act is limited to amounts "paid by or collected from any claimant as tax" to the extent that the claimant can show that he has in fact borne the burden of the tax. The Abattoir which paid the tax had no right to recover since it admittedly did not bear the burden of the tax, and the petitioner, as its assignee, has no different claim.

The fact that Abattoir shifted to the petitioner the burden of the taxes imposed in the slaughtering of hogs for the petitioner did not give the petitioner a claim against the United States; no part of the processing taxes claimed were paid by or collected from the petitioner *as taxes;* the petitioner simply paid to the Abattoir an increased fee for its services because of the tax. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176; *Arabi Packing Co.* v. *Commissioner,* 109 F. 2d 278 (C. C. A. 5th); *Lindner Packing & P. Co.* v. *Commissioner,* 118 F. 2d 656 (C. C. A. 10th); *Oswald Jaeger Baking Co.* v. *Commissioner,* 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Fuhrman & Forster Co.* v. *Commissioner,* 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686. Hence the court below was correct in affirming the decision of the district court, holding that the petitioner had not stated a claim on which relief could be granted.

2. While the court below disagreed with the decision of the Circuit Court of Appeals for the Third Circuit in *Interwoven Stocking Co.* v.

United States, 144 F. 2d 768, we think that there is no direct conflict between the decisions. In the *Interwoven Stocking Company* case, the facts, as summarized by the court, were that the Interwoven Stocking Company had all of its products manufactured by a wholly owned and completely dominated subsidiary operating as a production department of the parent's business, and that the Interwoven Company was the only customer of the subsidiary. Subsequent to the payment by the subsidiary of floor stock taxes under the Agricultural Adjustment Act, the subsidiary was merged with the parent company.

The Third Circuit held that there was no change of identity worked by the merger and that the taxes paid by the subsidiary were recoverable by the parent corporation upon its showing that it had borne the burden of the tax. The decision was based on the premise that there was, in substance, but one business and one taxpayer both before and after the merger, and that the taxpayer suing to recover was the same person that paid the tax and bore the burden of it. While we think that the decision was incorrect in holding that the separate entities of parent and subsidiary should be disregarded (see *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593), and in failing to hold that strict compliance with the limitations imposed by Section 902 is necessary to a recovery of a tax collected under the Agricultural Adjustment Act (see *Arabi Pack-*

ing Co. v. *Commissioner, supra*), the instant case does not involve the same situation. The Abattoir was not a subsidiary of the petitioner or a production department of its business but a distinct entity which slaughtered hogs for the petitioner and other customers and required its customers, including the petitioner, to pay a charge which was increased by the amount of the tax. The fact that all of the stock of each corporation was owned by the same individual does not justify the disregard of the separate entities of these corporations. See *Moline Properties* v. *Commissioner,* 319 U. S. 436; *Planters Oil Co.* v. *Hopkins,* 286 U. S. 332.

In this case there was no identity of the corporations when the taxes were paid and there was no statutory merger nor any *de facto* merger resulting from an absorption of a subsidiary by a parent company. There was merely a purchase of the assets of the processor by its former customer (the petitioner) in exchange for stock of the customer. In such a case the identity of the old corporation does not continue in the purchasing corporation. See *Helvering* v. *Metro. Edison Co.,* 306 U. S. 522, 527, and *Hughes Tool Co.* v. *Commissioner,* 147 F. 2d 967 (C. C. A. 5th). Even if we assume that the transaction qualified as a reorganization for tax purposes, the *Interwoven Stocking Company* case does not necessarily support the view that a successor to the assets and liabilities of one corporation as the result of a

reorganization may claim a right against the Government which neither had before.

3. If, as the court below held, the petitioner has not met the statutory requirements for a refund, it is clear that it has no constitutional grievance. Petitioner paid no tax, and, in fact, had not even a common-law right against the processor, Abattoir, to whom it paid the moneys in question. *Cohen* v. *Swift & Co.*, 95 F. 2d 131 (C. C. A. 7th), certiorari denied, 304 U. S. 561.

Moreover, the argument that, under the decision of the Circuit Court of Appeals, a recovery could never be had where the taxpayer is dead, or, if a corporation, is dissolved, is absurd. In such cases, the suit could be freely brought by the personal representative of the deceased person or the successor of the corporation, but the right to recover would be subject to the same limitations as it would have been in a suit by the taxpayer.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
HELEN R. CARLOSS,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

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